No. 15-674

IN THE

Supreme Court of the United States

UNITED STATES, *et al.*, *Petitioners*,

v.

TEXAS, *et al.*, *Respondents*.

On Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

Brief *Amicus Curiae* of Citizens United, Citizens United Foundation, English First, English First Foundation, U.S. Justice Foundation, The Senior Citizens League, Conservative Legal Defense and Education Fund, Policy Analysis Center, U.S. Border Control Foundation, Constitution Party National Committee, and Institute on the Constitution in Support of Respondents

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTEREST OF THE *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 2

ARGUMENT 5

I. Petitioners Have Failed to Demonstrate that Congress Has Vested in the Executive Broad Authority to Grant "Lawful Status" to Those to Whom Congress Has Refused to Grant Such Status 6

A. The Immigration and Nationality Act Does Not Delegate to the Secretary the Power to Establish Immigration Policies; It Establishes Rules for Him to Enforce 6

B. The Secretary of Homeland Security Is without Authority to Confer "Lawful Presence" Status on Illegal Aliens 10

C. Granting Lawful Presence to Illegal Aliens under DAPA Will Drain Prematurely the Social Security Trust Funds 15

II. DAPA Violates the Separation of Powers 17

A. The Secretary's Call for "Great Deference" to His "Discretion" to Promulgate and to Enforce DAPA Should Be Rejected 17

B. DAPA Is Not a General Statement of Policy, but Is a Rule Governing Private Conduct, Constituting an Unconstitutional Exercise of Legislative Power 19

III. The Respondent States Have the Constitutional Right to Challenge DAPA ... 25

A. The Guidance's Effect on the States Is Direct and Targeted, Not Indirect and Incidental 25

B. The Role of the Federal Courts as the Third Branch of the Federal Government Is to Protect the Sovereignty of the States Secured by the Tenth Amendment 28

CONCLUSION 36

TABLE OF AUTHORITIES

Page

CONSTITUTION

Art. I, Sect. 1 21
Art. I, Sect. 3 30
Art. II, Sect.3, Cl. 5 5
Art. III, Sect. 2 33
Amendment X 28, 31
Amendment XI 29
Amendment XIV 35, 36
Amendment XVII 30

STATUTES

Administrative Procedure Act, 5 U.S.C. §§ 500, *et seq* 5, 19
Immigration and Nationality Act, 8 U.S.C. §§ 1101, *et seq* ..... 7, *passim*
8 U.S.C. § 1611(b)(2)-(3) 8, 15

CASES

Arizona v. United States, 132 S.Ct. 2492 (2012) .. 9
Chisholm v. Georgia, 2 U.S. 419 (1793) 29
Cohens v. Virginia, 19 U.S. 264 (1821) 4, 34
Commonwealth *ex rel.* Cuccinelli v. Sebelius, 728 F.Supp.2d 768 (E.D. Va. 2010), *rev'd* 656 F.3d 253 (4th Cir. 2011) *cert. denied* 133 S.Ct. 59 (2012) 32
Dept. of Transportation v. Ass'n. American R.R., 135 S.Ct. 1225 (2015) 21, 22, 24
Louisiana v. Bryson, 132 S.Ct. 1781 (2012) 31
Massachusetts v. Mellon, 262 U.S. 447 (1923) .. 33
Nebraska v. Colorado (No. 144, Orig.) 577 U.S. ___ (Mar. 21, 2016) 31, 35

INTEREST OF THE *AMICI CURIAE*[1]

Citizens United, English First, and The Senior Citizens League are nonprofit social welfare organizations, exempt from federal income tax under section 501(c)(4) of the Internal Revenue Code ("IRC"). Citizens United Foundation, English First Foundation, U.S. Justice Foundation, Conservative Legal Defense and Education Fund, Policy Analysis Center, and U.S. Border Control Foundation are nonprofit educational organizations, exempt from federal income tax under IRC section 501(c)(3). The Constitution Party National Committee is a national political party. Institute on the Constitution is an educational organization.

These organizations were established, *inter alia*, for educational purposes related to participation in the public policy process, which purposes include programs to conduct research and to inform and educate the public on important issues of national concern, the construction of state and federal constitutions and statutes related to the rights of citizens, and questions related to human and civil rights secured by law, as well as related issues and activities.

Most of these *amici curiae* submitted an *amicus curiae* brief in this case before the U.S. Court of Appeals for the Fifth Circuit.

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[1] It is hereby certified that counsel for the parties have consented to the filing of this brief; that no counsel for a party authored this brief in whole or in part; and that no person other than these *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

SUMMARY OF ARGUMENT

Deferred Action for Parents of Americans and Lawful Permanent Residents ("DAPA") grants "lawful presence" to up to four million aliens who are presently in the United States in defiance of the immigration laws of the nation. Unable to find any direct authority for the Secretary of Homeland Security to change the immigration status of these illegal aliens, the United States attempts to manufacture such authority from the totality of all of the immigration and naturalization laws administered by the Secretary. But an examination of the statutory scheme reveals that as to aliens, it is Congress, not the Secretary, that decides who may stay and who must go. Moreover, any effort to glean authority for DAPA from immigration law must overcome the reality that DAPA was implemented at the order of a President who had become frustrated and impatient after having failed to persuade Congress to enact his DREAM Act.

Although the United States claims that DAPA "does not confer any form of legal status," that claim is inconsistent with the specific terms of that Guidance which provides that the benefitted persons will be deemed "lawfully present" in the United States, making them eligible for work authorization, federal and state benefit programs, Social Security and Medicare, the Earned Income Tax Credit, and other benefits of "lawful presence." By allowing illegal aliens to work and receive financial benefits paid for by the American people, DAPA will encourage illegal aliens to stay in the United States, rather than return to their homeland. And, DAPA will again attract new

waves of illegal immigrants by again demonstrating that, at least once each generation, American politicians can be counted on to show disrespect for their own nation's immigration laws, not just by refusing to enforce those laws, but by providing those who violate them with financial rewards as well. The United States tells this Court that DAPA status is revocable in the absolute discretion of the Secretary, yet it encourages illegal aliens to apply so that they may stay "without fear of deportation." Further, there is no doubt that DAPA will accelerate depletion of the Social Security Old Age and Disability Insurance trust funds. If additional benefits are to be paid from those trust funds, it should be Congress that makes that decision, not the Executive Branch.

In claiming unilateral power to alter the nation's immigration rules, the Executive Branch usurps legislative authority. Yet when a majority of the States in the union apply to the federal courts for relief to end to such usurpation, the United States insists that the matter be resolved only by the political branches, leaving the third branch of government to stand idly by, and do nothing to restore Constitutional order. The United States demands that this Court grant the Executive what it calls "great deference" in changing the status of millions of illegal aliens, but the Secretary certainly cannot be trusted to evaluate whether his own actions are Constitutional. That task, indeed, that responsibility, falls to this Court.

The United States attempts to characterize DAPA is a general statement of policy, but it is abundantly clear on the record that it is a rule governing private

conduct — the sort of rule that falls within the exclusive legislative powers of the U.S. Congress. The Secretary asserts that even after it is granted, he alone has "absolute discretion" to revoke deferred action under DAPA. It is time for this Court to remind the Secretary that our nation was not founded on the wilful rule of any man, but rather on the rule by law.

The United States asks this Court to bar access to the Courthouse door to this action brought by a majority of the sovereign States, asserting a controversy with the Executive Branch, by technical application of rules of standing that govern cases between private litigants. The United States asserts that the sovereign States have only a "generalized grievance" with no financial losses except of its own choosing. But such financial costs to the States can in no way be viewed as "incidental" or "indirect," as they are essential to achieve the humanitarian purposes for which DAPA was designed. Such costs are both direct and purposeful, and thus support the States' legal standing in this controversy.

However, even if the judicially written rules governing the standing of private parties had not been met, this Court would still have the obligation to adjudge this controversy and decide it on its merits. In 1821, Chief Justice Marshall in Cohens v. Virginia, drawing on the clear language of Article III, Section 2, distinguished certain rules for hearing "cases" — based on the character of the cause, and different rules for deciding "controversies" — based on the character of the parties. The Chief Justice instructed that in controversies involving the United States and the

States "it is entirely unimportant what may be the subject of the controversy. Be it what may, these parties have a constitutional right to come into the Courts of the Union." To rule otherwise would be to deny legal and constitutional protection of the "sovereign interests" of the 50 independent States in violation of the nation's federal structure.

ARGUMENT

In granting *certiorari*, this Court asked the parties to address four questions relating to "Deferred Action for Parents of Americans and Lawful Permanent Residents" ("DAPA"): (i) standing and justiciability; (ii) lawfulness; (iii) compliance with Administrative Procedure Act's ("APA") notice-and-comment procedures; and (iv) the "Take Care" Clause. These *amici curiae* addressed the "Take Care" clause at length in their *amicus curiae* brief in the Fifth Circuit, substantially supplementing the treatment of that issue in the brief filed by the States.[2] In this Court, however, the States completely and persuasively address that clause, leaving little more to say. Similarly, the States fully address the APA notice-and-comment issue, so this issue is only briefly addressed in Section II.B, *infra*.

This *amicus curiae* brief addresses the question of lawfulness, both in Section I focusing on immigration

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[2] Brief *Amicus Curiae* of Citizens United, *et al.*, U.S. Court of Appeals for the Fifth Circuit, May 11, 2015, at 17-26. http://www.lawandfreedom.com/site/constitutional/Texas%20v%20US%20-%20CU%20Amicus%20Brief.pdf.

law and in Section II addressing the separation of powers. Section III addresses the jurisdiction of federal courts to resolve the Texas challenge based on issues of federalism and standing.

I. PETITIONERS HAVE FAILED TO DEMONSTRATE THAT CONGRESS HAS VESTED IN THE EXECUTIVE BROAD AUTHORITY TO GRANT "LAWFUL STATUS" TO THOSE TO WHOM CONGRESS HAS REFUSED TO GRANT SUCH STATUS.

Although the United States would downplay the significance of its executive actions taken on November 20, 2014, there is no question that DAPA grants "lawful presence" to millions of aliens who are present in the United States in defiance of immigration law enacted by Congress.[3] Before addressing the issue of the standing of 26 states to challenge this executive action, we address whether there is any statutory warrant whatsoever for DAPA.

A. The Immigration and Nationality Act Does Not Delegate to the Secretary the Power to Establish Immigration Policies; It Establishes Rules for Him to Enforce.

The United States Petitioners and the State Respondents paint a dramatically different picture of

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[3] In general, the category of aliens benefitted by DAPA are those aliens who have lived in the United States for five years, and either came here as children or already have children who are U.S. citizens or permanent residents.

the nature and scope of the powers vested in the Secretary of Homeland Security under the Immigration and Nationality Act ("INA"). *Compare* Brief for Petitioners ("Pet. Br.") at 2-9, 42-64 *with* Brief for State Respondents ("Resp. Br.") at 2-16, 38-45. Using sweeping rhetoric, the United States asserts that Congress has granted "the Secretary[] broad statutory authority to '[e]stablish[] national immigration enforcement policies and priorities'... and to carry out the 'administration and enforcement of [the INA] and all other laws relating to the immigration and naturalization of aliens.'" Pet. Br. at 42. By painting with such a broad stroke, the United States posits that the Secretary has unfettered discretionary power "to address a difficult National problem involving severe resource constraints and significant humanitarian and policy concerns" in light of the "fact ... millions of undocumented aliens will continue living and working here." *Id.* Further, because the Secretary's action is based entirely upon his "broad discretion" not to enforce the law, the United States maintains that it also possesses discretionary power to authorize the "lawful presence" of aliens who fall within the category of aliens favored by the Secretary's Guidance. *See id.* at 42-43.

In contrast, the State Respondents detail each Congressionally authorized category of lawful immigrants, demonstrating that in no way has Congress "given the Executive *carte blanche* to permit aliens to be lawfully present in the country[; rather Congress has] delineated 'specified categories of aliens' who may be admitted into and present in the country." Resp. Br. at 2. In five pages of their brief, the States

set forth in retail fashion the several statutes defining "lawful presence," with the observation that "when Congress has seen fit to grant lawful presence to a significant portion of the aliens present unlawfully in the country, it has enacted legislation to do so." *Id.* at 2-4. In each case, granting lawful presence was by act of Congress, not by Executive fiat. In particular, the States call this Court's attention to the fact that, by statute, "Congress [has] strictly limited an alien's ability to acquire lawful presence on family-unification grounds." *Id.* at 4. Further, the States point out that Congress has also enacted numerous statutes denying unauthorized aliens access to government benefits (including Social Security and Medicare[4]), and denying to the Secretary "free rein to grant work authorization." *Id.* at 6-8.

In response, the United States has insisted that the States' reading of the INA is "untenable":

> Deferred action and similar discretionary practices that DHS and the INS before it have repeatedly followed do not have their source in pinpoint grants of authority by Congress. They have always been, and have always been understood to be, exercises of the general vesting power that Congress bestowed in Section 1103. [Pet. Br. at 61.]

However, it is the position of the United States that is untenable, not the position of the States. The United

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[4] *See* 8 U.S.C. § 1611(b)(2)-(3). For a discussion of the effect of DAPA on Social Security and Medicare, *see* Section I.C., *infra*.

States draws exactly the wrong conclusion from the "'extensive and complex' statutes governing 'immigration and alien status.'" *See* Resp. Br. at 2. From the statutory scheme, it must be concluded that it is Congress that decides which categories of aliens may stay and which must go, not the Secretary of Homeland Security.

The notion that the Executive is acting pursuant to Congressional authority is further undermined by recent history. Having failed to persuade Congress to enact the DREAM Act and eviscerate many of the nation's immigration laws, the Obama Administration decided to accomplish that objective unilaterally. Thrice, Congress has made known its position with respect to the provisions of DAPA. First, Congress has explicitly legislated with regard to the legality of aliens' presence and the grounds for their removal. *See* Arizona v. United States, 132 S.Ct. 2492, 2499 (2012). As the U.S. Department of Justice Office of Legal Counsel's own Memorandum ("OLC Memo") notes, "[i]n the INA, Congress established a comprehensive scheme governing immigration and naturalization." *Id.* at 3. Second, Congress implicitly rejected the President's DAPA scheme, in refusing to take any steps toward enacting the DREAM Act.[5] Third, Congress has on occasion granted the President

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[5] *See* K.R. Thompson, "The Department of Homeland Security's Authority to Prioritize Removal of Certain Aliens Unlawfully Present in the United Sates and to Defer Removal of Others," U.S. Department of Justice, Office of Legal Counsel (Nov. 19, 2014). https://www.justice.gov/sites/default/files/olc/opinions/attachments/2014/11/20/2014-11-19-auth-prioritize-removal.pdf.

only narrow, statutorily defined circumstances whereby he may grant deferred-action status for certain specified illegal aliens.

The President's assumption of a broad general power to waive the nation's immigration laws is simply incompatible with the narrow and detailed statutory scheme. With DAPA, the President has acted contrary to Congress' clear desires, his power is clearly "at its lowest ebb,"[6] and indeed, its exercise is unconstitutional.

B. The Secretary of Homeland Security Is without Authority to Confer "Lawful Presence" Status on Illegal Aliens.

The primary DAPA Memorandum issued November 20, 2014 is bureaucratically entitled "Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children and with Respect to Certain Individuals Who Are the Parents of U.S. Citizens or Permanent Residents."[7] In one convoluted sentence filled with contradiction, the Memorandum states:

> Deferred action does **not** confer any form of **legal status** in this country, much less

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[6] Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 637 (1952) (Jackson, J. concurring). *See* discussion in Section II.B, *infra*.

[7] https://www.dhs.gov/sites/default/files/publications/14_1120_memo_deferred_action.pdf.

> citizenship; it simply **means** that, for a specified period of time, an individual is permitted to be **lawfully present** in the United States [and may] apply for work authorization.... [Memorandum of November 20, 2014 at 2-3 (emphasis added).]

Since DAPA declares that millions of illegal aliens may be deemed "lawfully present" — not just present — in the United States, how could that not constitute a change in "legal status?"

As the States' brief puts it:

> The words "lawful presence" are not meaningless: they deem the unlawful conduct of millions of aliens to be lawful, placing aliens in a legal status with significant consequences.... Presumably, that is why the President candidly admitted that DAPA recipients would get "a legal status." [Resp. Br. at 40.]

Although a general grant of authority to DHS to enforce the INA might be the source of the "[d]eferred action and similar discretionary practices," that grant does not confer upon the recipient alien any of the benefits that accompany lawful presence. Pet. Br. at 61. However, there is no question that this is what DAPA was designed to do. DAPA confers upon the deportable alien benefits, including work authorization, that, by statute, are available only to those aliens who are lawfully present by statute. Again, as the States have observed:

> DAPA ... triggers numerous consequences. It removes eligibility bars for Social Security, Medicare, and the Earned Income Tax Credit; tolls the reentry-bar clock; and gives access to "advance parole," which allows aliens to leave the country and rereenter.... In addition to these federal benefits, DAPA also renders aliens eligible for many state benefits, such as driver's licenses and unemployment insurance. The nonpartisan congressional Joint Committee on Taxation estimates that, over a 10-year period, DAPA recipients could receive $1.7 billion in Earned Income Tax Credit payments alone. [Resp. Br. at 11-12.]

Additionally, DAPA will have other unstated effects. Based on government data, the Pew Research Center reported last year that: "[f]rom 2009 to 2014, 1 million Mexicans and their families ... left the U.S. for Mexico [and] 870,00 Mexican nationals left Mexico to come to the U.S."[8] Irrespective of the accuracy of these numbers, there is no question that significant numbers of Mexicans (and others) who illegally enter the United States, eventually again cross the border to return to their homeland. As to those persons who leave the United States due to the difficulty of working illegally, there is no question that DAPA's work authorization and free government benefits will convince many of them to remain. Moreover, since our

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[8] A. Gonzalez-Barrera, "More Mexicans Leaving Than Coming to the U.S.," Pew Research Center (Nov. 19, 2015). http://www.pewhispanic.org/2015/11/19/more-mexicans-leaving-than-coming-to-the-u-s/.

nation's immigration laws appear to alternate enforcement and different forms of amnesty,[9] when coupled with our nation's porous border,[10] there is every reason to expect that more persons will illegally immigrate to the United States in anticipation of the next amnesty policy that the Executive Branch will offer illegal aliens.

It is also disingenuous to respond, as the United States does, that its Guidance only "involves an exercise of discretion to forbear from enforcement against an alien who remains removable." Pet. Br. at 62. The Department of Homeland Security's U.S. Citizenship and Immigration Services clearly implies on its website that DAPA is not revocable: "If you receive deferred action under DAPA, you may be able to stay in the United States temporarily without fear of deportation."[11] If the government's decision can be

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[9] The immigration amnesty bill signed by President Reagan in 1984 was thought at the time to be the last such amnesty that would be offered. *See* NPR, "A Reagan Legacy: Amnesty for Illegal Immigrants" (July 4, 2010). http://www.npr.org/templates/story/story.php?storyId=128303672.

[10] Over 1 million people have now watched the video entitled "Do You Feel Safe?" made by self-described "Guerrilla Journalist" James O'Keefe on behalf of Project Veritas, who repeatedly crossed the U.S.-Mexico border unimpeded, once dressed as Osama bin Laden, with no fence or border agents in sight. https://www.youtube.com/watch?v=fB37TCDcZBg.

[11] USCIS, "You may be able to request DAPA. Want to learn more?" (Jan. 30, 2015). https://www.uscis.gov/sites/default/files/USCIS/ExecutiveActions/EAFlier_DAPA.pdf.

revoked at any time, how could there be no "fear of deportation" as promised by the program's informational brochure?

Finally, even if the apparent promise made in the government's informational brochure later were broken by the Secretary, while in effect, DAPA status triggers numerous entitlements that would otherwise be denied that very alien on account of his unlawful presence. It does not matter, as the States point out in their brief, that DAPA can be revoked, since an "alien is still deemed lawfully present – and thus eligible for valuable benefits – until any revocation" (Resp. Br. at 41):

> DAPA's granting of lawful presence pushes the concept of deferred action far beyond what this Court has recognized. "[D]eferred action" is merely the "discretion to abandon" the "initiation or prosecution of various stages in the deportation process."... But a decision not to initiate enforcement action cannot transform unlawful conduct into lawful conduct. [Resp. Br. at 41.]

In short, under the nation's laws, "lawful presence" can only be conferred pursuant to an Act of Congress. It is a not a status subject to manipulation by the President or his Secretary. Although the Secretary may possess a degree of discretion as to which illegal aliens to deport now or later, he certainly has no authority to revise their status while here. An alien physically present in the United States in violation of Congressionally crafted immigration laws is and

remains an illegal alien, until he is deported or chooses to leave the country voluntarily.

As demonstrated in Section II, *infra*, the Secretary's unauthorized DAPA memorandum also constitutes an usurpation of legislative power vested exclusively by the Constitution to Congress.

C. Granting Lawful Presence to Illegal Aliens under DAPA Will Drain Prematurely the Social Security Trust Funds.

The adverse financial effect of DAPA on the federal budget can be demonstrated by its effect on just one of the several benefits programs that would be impacted. Persons granted "lawful status" under DAPA would no longer be barred from receiving Social Security Disability Insurance and Retirement benefits. 8 U.S.C. § 1611(b)(2)-(3). This consequence of DAPA is freely admitted by the United States. *See* Pet. Br. at 8. Even without the addition of some portion of the four million new DAPA beneficiaries, the trust funds from which those benefits are generally paid face a seriously troubled financial future.[12] Moreover, lower income workers, such as most of those benefitted by DAPA, will receive disproportionately greater benefits relative to taxes paid than higher income workers, causing a significant net drain on trust funds.[13]

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[12] *See* 2015 Annual Report of the Trustees (July 22, 2015), pp. 2-3, https://www.ssa.gov/oact/TR/2015/tr2015.pdf.

[13] An illegal alien born in 1995 granted lawful status under DAPA who fell in the "low earnings" tier (career average earnings equal

Moreover, about two-thirds of those eligible for deferred action under DAPA are from Mexico.[14] The United States and Mexico have already negotiated a Social Security Totalization Agreement which, if it were to go into effect, would dramatically increase the drain on Social Security OASI trust funds by Mexican Nationals.[15] Under the totalization agreement, immigrants would receive credit towards taxes paid into the Mexico retirement system, and only six quarters of credits would be needed in the U.S. in order to be able to receive Social Security benefits.[16]

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to $20,308) would receive annual Social Security benefits of $11,251 in wage-indexed 2014 dollars. On the other hand, a U.S. citizen born the same year in the "high earnings" tier (career average earnings equal to $72,206) would **pay 3.5 times the taxes** paid by the low income worker, but would receive annual Social Security benefits of $24,567 — **only 2.2 times the benefits paid** to the low income worker. *See* Office of the Chief Actuary, Social Security Administration, Actuarial Note No. 2014.9 (July 2014), "Replacement Rates for Hypothetical Retired Workers," Table C.

[14] J. Krogstad, "Key facts about immigrants eligible for deportation relief under Obama's expanded executive actions" (Jan. 19, 2016), http://www.pewresearch.org/fact-tank/2016/01/19/key-facts-immigrants-obama-action/.

[15] *See* GAO Report, "Social Security: Proposed Totalization Agreement with Mexico Presents Unique Challenges" (Sept. 2003), http://www.gao.gov/new.items/d03993.pdf.

[16] *See* TSCL, "Ask the Advisor: Totalization Agreement with Mexico" (Feb. 6, 2014), http://seniorsleague.org/2014/ask-the-advisor-february-2014/.

Decisions that would grow the liabilities of the United States must be left to the branch with the power of the purse. Congress has developed a nuanced system of entitlement programs and immigration controls, including the payment of benefits only to certain persons. DAPA upends that system, wresting the decision-making authority from Congress and imposing untold new liabilities on the United States, putting older Americans at increased financial risk, in ways that Congress had refused to sanction.

II. DAPA VIOLATES THE SEPARATION OF POWERS.

A. The Secretary's Call for "Great Deference" to His "Discretion" to Promulgate and to Enforce DAPA Should Be Rejected.

In addition to relying on supposed Congressionally-conferred powers to enforce the INA, the United States urges this Court to uphold DAPA for historic reasons as being consistent with "[l]ong settled practice under the immigration laws [which] underscores that the Guidance is a lawful exercise of the Secretary's broad discretion." Pet. Br. at 43. The United States asserts "[t[hat history confirms that discretion, of necessity, is a principal feature of the administration and enforcement of the INA." *Id.* From this historical record, the United States would have this Court respect "the Secretary's longstanding **interpretation** of the INA ... authorizing these practices [(including DAPA) as being] entitled to **great deference**." *Id.* (emphasis added). Thus, the United States contends that "deferring action" coupled with "work

authorization" have been commonplace through the years, exhibiting an "ongoing **push and pull** over the Nation's immigration policies by those who are democratically responsible for formulating and implementing them." *Id.* (emphasis added).

But the Constitution's separation of powers structure requires more than the check and balance of the two political branches, as that would negate the role of the judiciary. The three main powers of government were separated to reflect a fixed rule of law. Thus, the United Sates' call for judicial deference to the Executive branch's "interpretation" of the law, if accepted, would "represent[] a transfer of judicial power to the Executive Branch, [thereby eroding] the judicial obligation to serve as a 'check' on the political branches," as Justice Thomas has recently stated:

> the judicial power, as originally understood, requires a court to exercise its independent judgment in interpreting and expounding upon the laws. [Perez v. Mortg. Bankers Ass'n. 135 S.Ct. 1199, 1217 (2015) (Thomas, J., concurring).]

And, as Justice Thomas has further explained, "[i]ndependent judgment require[s] judges to decide cases in accordance with the law of the land, not in accordance with pressures placed upon them through either internal or external sources." *Id.* at 1218. Unlike the Secretary, this Court is "'free from the bias of having participated in [the] formation'" of DAPA. *See id.*

Summing up the case against deferring to an Executive Branch member's interpretation of the legality of the Branch's own rule, Justice Thomas concluded:

> That deference amounts to a transfer of the judge's exercise of interpretive judgment to the agency.... But the agency, as part of the Executive Branch, lacks the structural protections for independent judgment adopted by the Framers, including the life tenure and salary protections of Article III. [*Id.* at 1219-1220.]

Therefore, this Court must decline the invitation of the United States to defer to the Secretary's own interpretation that DAPA complies with the statutory authorization to administer and enforce INA.

B. DAPA Is Not a General Statement of Policy, but Is a Rule Governing Private Conduct, Constituting an Unconstitutional Exercise of Legislative Power.

In the section of its brief addressing whether the Guidance is exempt from APA notice-and-comment rulemaking requirements, the United States has asserted that the Guidance is only "a general statement of policy regarding how DHS will exercise its enforcement discretion under the INA." Pet. Br. at 65. Yet, elsewhere in that same brief, the United States describes DAPA as a "general statement of policy," with a six-part substantive rule of conduct:

> To request consideration for deferred action via DAPA, an applicant **must**: (1) as of November 20, 2014, be the parent of a U.S. citizen or lawful permanent resident; (2) have continuously resided here since before January 1, 2010; (3) have been physically present here on November 20, 2014, and when applying for relief; (4) have no lawful immigration status on that date; (5) not fall within the Secretary's enforcement priorities; and (6) "present no other factors that, in the exercise of discretion, make[] the grant of deferred action inappropriate." [Pet. Br. at 10.]

Although element (6) appears to make all the other elements subject to the Secretary's discretion, the district court below found otherwise, that the Guidance is "binding because it effectively eliminates any discretion in the processing of DAPA applications." *See* Resp. Br. at 62; 86 F.Supp.3d 591, 666. Indeed, the district court "took note" of the President's public statements that compared "DAPA to a binding military order [that] promised 'consequences' for agents 'who aren't paying attention to our new directives'...." Resp. Br. at 62. As the Respondent States have ably argued, the Guidance is hardly a general statement of policy, which "must be 'wholly nonbinding'" (*id.* at 61), but a rule creating rights and obligations, given "the rigid nature of the decisionmaking process prescribed in DACA's lengthy operating procedures." *See id* at 63. In short, as the President, himself, bluntly stated: "'I just took an action to change the law.'" *See id.* at 67.

Rightfully, the Respondent States have remonstrated that, under the APA, such a change in the law cannot be done without APA notice and comment. However, even that administrative process cannot be substituted for the presentment and bicameral process fixed by Article I, Section 7 of the Constitution that governs the exercise of legislative power. *See* Dept. of Transportation v. Ass'n. American R.R., 135 S.Ct. 1225, 1237 (2015) ("DOT") (Thomas, J., concurring).

As Justice Thomas has recently stated, such power is vested by Article I, Section 1 of the Constitution in Congress alone, and Congress "cannot delegate 'its exclusive legislative' authority at all." *Id.* The question, then, is whether the Guidance rule is an exercise of legislative power.

Although the Guidance is a rule governing the Secretary and DHS agents in the administration and enforcement of INA, it is also a rule of private conduct. First, the Guidance requires the alien to apply for DAPA lawful presence status. *See* Pet. Br. at 10. Second, the Guidance requires the alien to affirmatively demonstrate that he is entitled to the deferred action status, including but not limited to "not fall[ing] within the Secretary's enforcement priorities." *Id.* And third, presumably if an applicant fails to stay outside of those enforcement priorities, he would be outside the Guidance and subject to priority removal. In sum, the Guidance is a "generally applicable rule of private conduct," in that it applies generally to all aliens, but benefits only those aliens who "have no

lawful immigration status on th[e] date" of application. *Id.*

Because the Guidance is a "'law' in the Blackstonian sense of [a] generally applicable rule[] of private conduct" (*see* DQT at 1245), it is outside the authority of the DHS. Article I, Section 1 vests legislative power exclusively in Congress. *Id.*

> The [Constitution] itself and the writings surrounding it reflect a conviction that the power to make the law and the power to enforce it must be kept separate, particularly with respect to the regulation of private conduct. [*Id.* at 1244.]

The United States would have it the other way around. It argues that, because the Secretary has been granted by statute broad discretionary powers to enforce the INA, it has the unilateral power to make the Guidance rule. But just the opposite is actually the case. Additionally, the United States erroneously presumes that it is empowered to determine the nation's immigration policies, deferring action for two categories of aliens:

> Parents of U.S. citizens or lawful permanent residents, and people who come here as children, many of whom have never known another home. Deferred action ... provides some measure of dignity and decent treatment, and addresses some of the pressing policy consequences that their presence generates. It recognizes the damage that would be wreaked

> by tearing apart families, and it allows individuals to leave the shadow economy and work on the books to provide for their families, thereby reducing exploitation and distortion in our labor markets. [Pet. Br. at 42-43.]

Under our constitutional structure of separation of powers, it is not for the executive unilaterally to determine the nation's policies and then dictate the means for carrying out those policies. As Justice Black once explained: "In the framework of our Constitution, the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker." Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 587 (1952). Upon this constitutional premise and in response to President Truman's unilateral action of seizing the nation's steel mills in support of the country's war in Korea, Justice Black observed:

> The President's order does not direct that a congressional policy be executed in a manner prescribed by Congress – it directs that a presidential policy be executed in a manner prescribed by the President. The preamble of the order itself, like that of many statutes, sets out the reasons why the President believes certain policies should be adopted [and] proclaims these policies as **rules of conduct** to be followed.... The power of Congress to adopt such public policies as those proclaimed by the order is beyond question.... The Founders of this Nation entrusted the lawmaking power to the Congress **alone** in both good and bad times. It

> would do no good to recall the historical events, the fears of power and the hopes for freedom that lay behind their choice. Such a review would but confirm our holding that this seizure order cannot stand. [*Id.* at 588-89 (emphasis added).]

Over half a century has transpired since Justice Black wrote these stirring words. Providentially, just in the last October term of this Court, Justice Thomas recalled in some detail the "historical events" to which Justice Black referred:

> The idea that the Executive may not formulate generally applicable rules of private conduct emerged even before the theory of the separation of powers on which our Constitution was founded.
> The idea has ancient roots in the concept of the "rule of law," which has been understood since Greek and Roman times to mean that a ruler must be subject to the law in exercising his power and may not govern by will alone....
> [DOT at 1242.]

Contrarily, the United States extols its deferred action policy because "[a]n alien with deferred action remains removable at any time, and DHS has **absolute discretion** to revoke deferred action unilaterally, without notice or process." Pet. Br. at 5 (emphasis added). However, there is no virtue in unreviewable discretion; rather, such a concept is nothing other than a claim of right to rule by will, not by law.

III. THE RESPONDENT STATES HAVE THE CONSTITUTIONAL RIGHT TO CHALLENGE DAPA.

A. The Guidance's Effect on the States Is Direct and Targeted, Not Indirect and Incidental.

The United States Petitioners repeatedly contend that the Respondent States lack standing to sue because the effect that the Guidance allegedly has upon the States is only "indirect" and "incidental." *See* Pet. Br. at 20-29. In essence, the Secretary's claim boils down to the proposition that, whatever effects that the Guidance will have on the States, they are nothing more than the effects that any action taken by the federal government would have. *Id.* at 22. Thus, the Secretary asserts that, if States are allowed to sue the United States in this case, this Court would open the door to law suits challenging the legality of every federal statute or regulation, thereby "upend[ing] the federalism and separation-of-powers principles that form the foundation of our constitutional structure." *See id.* at 31. At bottom, the United States maintains that the States' grievance in this controversy is, at best, a "nonjusticiable generalized" one to be resolved politically by the legislative and executive branches of the federal government and the States, without any interference from the federal government's judicial branch. *See id.* at 21 and 32.

The United States is mistaken. By its own description of the Guidance, and the way that it works,

its effects are both direct and purposeful, not indirect and incidental.

The Secretary claims that he is authorized by the INA not only to administer and enforce the Act, but also to administer and enforce "'all other laws relating to the immigration and naturalization of aliens.'" *Id.* at 2. Included in this purported broad grant of power is the removal of aliens, belonging exclusively to the federal government. *Id.* Because "[t]he federal government cannot remove every removable alien," the Secretary claims sweeping powers to ensure that those aliens that are not removed are treated humanely (*id.* at 3.) for "in any given year, more than 95% of the undocumented population will not be removed, and aliens continue to be apprehended at the border or otherwise become removable." *Id.* at 4.

In order to cope with this vast number of removable aliens, and in keeping with his associated discretionary powers, the Secretary asserts that he regularly engages in "[d]eferred action ... 'for humanitarian reasons....'" *Id.* at 5. Typically, he admits, "[a]liens with deferred action are ineligible for most federal public benefits" or for any "state or local public benefit," unless voluntarily provided. *Id.* at 7-9.

In order for the new Guidance policy to work, the Secretary must do more than "forbear from removing aliens who qualify"; rather, as the States point out, he must "affirmatively grant[] lawful presence to aliens who would otherwise be unlawfully present [in order to be] eligible for work authorization." Resp. Br. at 11. Therefore, the States aver that the Guidance

"triggers numerous consequences," including the removal of bars for certain federal benefits, and "render[ing] aliens eligible for many state benefits, such as driver's licenses and unemployment insurance." *Id.* at 11-12 (footnotes omitted).

Conferring such state benefits are hardly "incidental" or "indirect" as claimed by the Secretary. To the contrary, the United States Petitioners admit that such benefits are essential to achieving the success of the DAPA directives:

> The Guidance is **carefully designed** to employ enforcement discretion, in the form of deferred action and **concomitant work authorization**, to address a difficult National problem involving **severe resource constraints** and **significant humanitarian** and policy concerns. [Pet. Br. at 42 (emphasis added).]

In short, the Guidance has been designed so as to enable the Secretary to refrain from efforts to remove approximately three or four million removable aliens not only to save the federal government millions of dollars, but to impose upon the States an unfunded mandate to carry out the Secretary's "humanitarian" goals. If that is not an "individualized injury to a 'legally protected interest,' ... 'fairly traceable' to the defendant's challenged conduct, ... redressable by a favorable decision" by this Court, it is hard to think of any that would be. Pet. Br. at 18. Clearly, the States have legal standing. *See* Resp. Br. at 18-36.

B. The Role of the Federal Courts as the Third Branch of the Federal Government Is to Protect the Sovereignty of the States Secured by the Tenth Amendment.

In it simplest terms, this litigation constitutes an effort by Texas and 25 other States to contest both the constitutionality and legality of an action of the Executive Branch which operates to their harm, petitioning the federal judiciary to constrain the federal executive. Apparently, it matters not to the federal executive that this litigation is joined in by more than half the States that comprise the union. The federal executive unashamedly asks this Court to deny standing based on tests which have been developed largely in cases involving private parties rather than to controversies between sovereigns. Although questions of federalism certainly can be implicated in cases involving private parties, they are never more central and prominent than when they pit a State against the national government.

It is in controversies such as this, that we will know whether the federalists or the anti-federalists were better prognosticators of where the Constitution they were debating would lead. Among the most contentious issues confronted in Philadelphia in 1787 was the degree to which the sovereignty of the several States would be preserved, and how it would be preserved. By vesting "[t]he judicial power of the United States ... in one Supreme Court," the question arose as to whether that Court could be fair in protecting the several States. Of course, most federalists denied that any particular Constitutional

provision, or the "whole mass" of "powers transferred to the federal Government" could ever become "dangerous to the portion of authority left in the several states." J. Madison, Federalist No. 45, G. Carey & J. McClellan, The Federalist (Liberty Fund: 2001), at 237. However, one of the most prominent anti-federalist voices predicted:

> [t]he judicial power will operate to effect, in the most certain, but yet silent and imperceptible manner, what is evidently the tendency of the constitution: — I mean, an entire subversion of the legislative, executive and judicial powers of the individual states....
>
> That the judicial power of the United States, will lean strongly in favour of the general government, and will give such an explanation to the constitution, as will favour an extension of its jurisdiction, is very evident.... [Brutus, No. 11, (Jan. 31, 1788) reprinted in 1 The Founders' Constitution at 282 (P. Kurland & R. Lerner, eds., Univ. of Chi. Press: 1987).]

Indeed, it did not take long until the Supreme Court was asked to decide whether federal courts had jurisdiction to hear disputes brought by private citizens against a State. It decided that question in the affirmative in Chisholm v. Georgia, 2 U.S. 419 (1793), a decision that was viewed as so violative of the federalist structure, that it was undone by the People only two years later by the Eleventh Amendment — the first constitutional amendment after the Bill of Rights.

The risk that States would become victimized by federal law and federal policies increased exponentially after the 1913 ratification of the Seventeenth Amendment which altered the procedure for the selection of U.S. Senators contained in Article I, Section 3. Rather than being chosen by legislatures of the several States, as they had been for 125 years, Senators would be selected by vote of the people. Under the original plan as described by Madison, the right to select Senators was accorded to give "to the state governments such an agency in the formation of the federal government, as must secure the authority of the former, and may form a convenient link between the two systems." J. Madison, Federalist No. 62, The Federalist at 320. There is reason to believe that the erosion of State power resulting from the Seventeenth Amendment was inadvertent, as it was largely ignored during debate in the press, in congressional debates, and in State legislatures during the ratification process.[17] *See* R.A. Rossum, Federalism, the Supreme Court, and the Seventeenth Amendment: The Irony of Constitutional Democracy (Lexington Books, 2001) at 219. However, the Seventeenth Amendment has no doubt contributed to the undeniable subsequent erosion of that sphere of power reserved to the States

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[17] One warning note was raised by Senator George Frisbie Hoar from Massachusetts, arguing some years before in favor of retention of the system embodied in Article I, Section 3: "state legislatures are the bodies of men most interested of all others to preserve State jurisdiction.... It is well that members of one branch of the Legislature should look to them for their reelection, and it is a great security for the rights of the States." Quoted in Rossum at 219.

by the Tenth Amendment.[18] Lacking the ability to select and remove Senators, the States must increasingly look to the Courts for protection against federal usurpation of their important role in our Constitutional Republic.

With the passage of time, that erosion of power has become manifest in decisions of this Court, where States have found it difficult to have their cases even heard, to say nothing about winning them on the merits. For example, in Louisiana v. Bryson (No. 140, Orig.), Louisiana objected to illegal aliens being counted and used in the apportionment of members of the House of Representatives, taking House seats from States like Louisiana and giving them to illegal alien-rich States like California.[19] Without opinion, this Court refused to consider Louisiana's constitutional claim challenging the manner of conducting the 2010 census.

More recently, this Court denied the motion of Nebraska and Oklahoma for leave to file a complaint against Colorado in an original jurisdiction action under Article III, Section 2, Clause 2, again without a written opinion. *See* Nebraska v. Colorado (No. 144,

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[18] *See generally* J. MacMullin, "Amplifying the Tenth Amendment," 31 ARIZ. L. REV. 915, 938 (1989).

[19] The U.S. Supreme Court denied Louisiana's Motion for leave to file a bill of complaint on March 19, 2012. 132 S.Ct. 1781 (2012). Some of these *amici* filed an amicus brief in support of Louisiana in that case. *See* Brief *Amicus Curiae* of U.S. Border Control, *et al.* (Jan. 13, 2012). http://www.lawandfreedom.com/site/constitutional/Louisianav Bryson_amicus.pdf.

Orig.) 577 U.S. ___ (Mar. 21, 2016). Dissenting from that denial, Justice Thomas (joined by Justice Alito), objected to the Court routinely — and improperly — exercising discretion in declining to decide cases properly within its original and exclusive jurisdiction. Justice Thomas explained that doing so deprives a State of any form of relief against another State where it believes it has been wronged in some way: "If this Court does not exercise jurisdiction over a controversy between two States, then the complaining State has no judicial forum in which to seek relief." *Id.* (slip op.) at 2.[20]

Should States continue to have access to the federal courthouse barred, this will continue to do violence to our nation's federal structure, denying a State the

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[20] The ability of States to call upon the federal courts to remedy illegal executive action was dealt another blow when Virginia challenged the individual mandate provision of the Affordable Care Act on its own behalf, was successful in district court, but then was rebuffed by the Fourth Circuit, which ruled that a State may not bring a *parens patriae* lawsuit against the federal government. A Petition for Writ of Certiorari was denied by this Court. Commonwealth *ex rel.* Cuccinelli v. Sebelius, 728 F.Supp.2d 768 (E.D. Va. 2010), *rev'd* 656 F.3d 253 (4th Cir. 2011) *cert. denied* 133 S.Ct. 59 (2012). Some of these *amici* filed an *amicus curiae* brief addressing the standing of Virginia to challenge the Affordable Care Act, both in the Fourth Circuit, and in this Court supporting the petition for certiorari. *See* Brief *Amicus Curiae* of Virginia Delegate Bob Marshall, *et al.*, U.S. Court of Appeals for the Fourth Circuit, (Apr. 4, 2011), at 1-10. http://www.lawandfreedom.com/site/health/VA_v_Sebelius_Amicus.pdf. *See* Brief *Amicus Curiae* of Virginia Delegate Bob Marshall, *et al.*, On Petition for a Writ of Certiorari to the U.S. Supreme Court (Nov. 3, 2011) at 6-26. http://www.lawandfreedom.com/site/health/VA_v_Sebelius_Amicus_SC.pdf.

right to be heard in a dispute between that State and one or both branches of the federal government. When a federal court will not even entertain a claim brought by a State, it creates stress within our federal structure that harms the national consensus.

Consider the three-part test for establishing standing in federal court: injury-in-fact, causation, and redressability, as articulated in a raft of cases since Massachusetts v. Mellon, 262 U.S. 447 (1923). None of these three tests are textual themselves, but have been developed so that the federal courts may have a method to analyze whether a particular dispute presents a judicially cognizable "case." The question here is whether these judicially crafted tests, which were primarily developed with private litigants, should be employed to rule that a state had not presented a judicially cognizable "controversy."

In Article III, Section 2, when discussing most types of disputes that would be permitted in federal courts, the term "cases" is employed: "The judicial power shall extend to all **cases**, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority;--to all **cases** affecting ambassadors, other public ministers and consuls;--to all **cases** of admiralty and maritime jurisdiction...." (Emphasis added.) However, when disputes involving governments are addressed, the term "controversies" is employed: "--to **controversies to** which the United States shall be a party;--to **controversies** between two or more states;--between a state and citizens of another state;--between citizens of different states;--between

citizens of the same state claiming lands under grants of different states, and between a state, or the citizens thereof, and foreign states, citizens or subjects." (Emphasis added.)

In Cohens v. Virginia, 19 U.S. 264 (1821), Chief Justice Marshall found meaning in the different terminology between "cases" and "controversies."

> Jurisdiction is given to the Courts of the Union in two classes of cases. In the first, their jurisdiction depends on the **character of the cause**, whoever may be the parties.... In the second class, the jurisdiction depends on the **character of the parties**. In this are comprehended "controversies between two or more States, between a State and citizens of another State," and between a State and foreign States, citizens or subjects." If these be the parties, it is entirely unimportant what may be the subject of controversy. Be it what may, **these parties have a constitutional right to come into the Courts of the Union**. [19 U.S. at 378 (emphasis added).]

While it is true that the enumeration of types of controversies in Section 2 does not expressly include a State controversy with the national government, it does include controversies like this one where the United States is a party. There should then be no question that the State challenge to the legality and constitutionality of an Executive action brought to the federal judiciary should be heard.

Federal courts can reasonably assume that States will not litigate against the national government for no reason. The injury-in-fact element should be presumed from the case being brought by a sovereign State. Likewise, the causal relationship between the injury suffered and the conduct complained about would generally be obvious, as there would generally be no third parties involved, whose interests are not represented in court. Lastly, at least when the constitutionality of an action is challenged, the relief sought is that the government would stop doing what it is not Constitutionally authorized to do, demonstrating that injunctive relief would appropriately redress the injury.

It should be enough, as Justice Thomas observed in dissent in Nebraska v. Colorado, that a State has alleged "significant harms to their sovereign interests...." Nebraska (slip op.) at 4. What can be more central to the sovereign interests of Texas and her sister states than the removal status of persons who either unlawfully entered or unlawfully remained within the geographic boundaries of those States?[21]

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[21] Additionally, persons declared by DAPA to be "lawfully present" in the United States could during that period have anchor babies in the United States who would claim U.S. Citizenship. And, under the Fourteenth Amendment, once a person gains United States Citizenship, he automatically becomes a citizen of the State in which he resides. Indeed, anchor babies born to persons "lawfully present" in the United States and "subject to the jurisdiction thereof" (Fourteenth Amendment, Section 1), would have a greater claim to citizenship than anchor babies born to illegal aliens who are in the United States in defiance of its laws. *See generally* H. Titus, W. Olson & A. Woll,

For all these reasons, a State should not be viewed as just any ordinary litigant in federal court, subject to standards developed to evaluate cases between private litigants, rather than to standards appropriate to controversies arising between the sovereign States and the national government. To do otherwise would show disrespect for the role of States and violate the judicial powers vested by Article III in the federal judiciary. The States cannot be constitutionally denied the right to bring the challenge now before the court and have it resolved on the merits.

CONCLUSION

The decision of the U.S. Court of Appeals for the Fifth Circuit should be affirmed.

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"Children Born in the United States to Aliens Should Not, by Constitutional Right, Be U.S. Citizens," U.S. Border Control (Dec. 13, 2005), http://www.lawandfreedom.com/site/constitutional/AlienBirth.pdf.